

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CORY JAMES HESSELTINE,) CASE NO. C04-1690-MJP
Petitioner,) (CR03-147-MJP)
v.)
UNITED STATES OF AMERICA,) REPORT AND RECOMMENDATION
Respondent.)

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner is a federal prisoner currently incarcerated at the Federal Correctional Institution at Sheridan, Oregon. Petitioner has filed a motion under 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his 2003 federal court sentence. Respondent has filed a response opposing petitioner's motion, and petitioner has filed a reply brief in support of his motion. Following a careful review of the record, this Court concludes that petitioner's § 2255 motion should be denied.

BACKGROUND

On May 9, 2003, pursuant to a plea agreement entered into with the government, petitioner pleaded guilty to a charge of conspiracy to produce false identification documents. The plea agreement reflects that petitioner agreed and stipulated as to the amount of loss involved in his offense and as to the applicability of two upward adjustments to his base offense level. The

01 plea agreement also reflects that the parties disagreed as to whether the evidence supported
 02 upward adjustments based upon the number of victims involved in the offense and petitioner's use
 03 of a special skill. The parties agreed that these two issues would be decided by the Court at
 04 sentencing.

05 At sentencing, the government presented evidence in support of its position that
 06 petitioner's offense conduct involved 50 or more victims.¹ The Court agreed that an enhancement
 07 based on the number of victims was appropriate. The Court also apparently rejected an argument
 08 by petitioner that he was entitled to a downward departure based upon over-representation of the
 09 seriousness of his criminal history. On August 22, 2003, petitioner was sentenced to a term of 46
 10 months confinement.

11 Petitioner did not file a direct appeal. He now seeks relief from his sentence under § 2255.
 12 Petitioner argues in his motion that he is entitled to relief under *Blakely v. Washington*, 124 S.Ct.
 13 2531 (2004), because certain factors were used to increase his sentence which were never decided
 14 by a jury or admitted by petitioner during his plea. Specifically, petitioner cites to the four-point
 15 enhancement he received for the number of victims involved in the offense, and to the two criminal
 16 history points added to his criminal history score for committing his offense while under the
 17 supervision of another court for a prior offense.

18 The government, in its answer to petitioner's motion, argues that the motion should be
 19 denied because (1) he procedurally defaulted on his claims by failing to raise them on direct appeal,
 20 and (2) *Blakely* does not apply retroactively to cases on collateral review. Because the
 21 retroactivity issue is clearly dispositive of petitioner's claims, the Court will proceed directly to
 22 consideration of that issue.

23 DISCUSSION

24 On June 24, 2004, the Supreme Court issued its opinion in *Blakely*. In *Blakely*, the

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 26 ¹ While the record indicates that the government originally intended to seek an enhancement for use of a special skill, the government did not pursue such an enhancement at the time of petitioner's sentencing. (See CR03-147MJP, Dkt. No. 77 at 7.)

01 Supreme Court addressed a provision of the Washington Sentence Reform Act which permitted
 02 a judge to impose a sentence above the statutory range upon finding, by a preponderance of the
 03 evidence, certain aggravating factors which justified the departure. *Id.* at 2535. The trial court
 04 relied upon this provision to impose an exceptional sentence which exceeded the top end of the
 05 standard range by 37 months. *Id.* The Supreme Court held that this exceptional sentence violated
 06 the Sixth Amendment because the facts supporting the exceptional sentence were neither admitted
 07 by petitioner nor found by a jury. The Court explained that "the 'statutory maximum' for ~~Apprendi~~
 08 purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected*
 09 *in the jury verdict or admitted by the defendant.*" *Id.* at 2537 (emphasis in original).

10 While petitioner's § 2255 motion was pending, the Supreme Court issued its ruling in
 11 *United States v. Booker*, 125 S.Ct. 738 (2005). In *Booker*, the Supreme Court addressed *Blakely*
 12 in the context of the Federal Sentencing Guidelines and concluded that the Sixth Amendment, as
 13 construed in *Blakely*, does in fact apply to the Federal Sentencing Guidelines. *Id.* at 745. The
 14 Supreme Court remedied the Sixth Amendment problem by excising the provision of the
 15 Sentencing Reform Act which made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus
 16 rendering the guidelines effectively advisory. *Id.* at 764-5.

17 The question this Court must address is whether the rights recognized in *Blakely*, and now
 18 in *Booker*, apply retroactively on collateral review. The Supreme Court did not address the
 19 retroactivity question in either *Blakely* or *Booker*.² However, the Supreme Court's recent decision
 20 in *Schrivo v. Summerlin*, 124 S.Ct. 2519 (2004) is essentially dispositive of the retroactivity
 21 question. In *Schrivo*, the Supreme Court held that its decision in *Ring v. Arizona*, 536 U.S. 584
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23 ² The Court notes that the Ninth Circuit has yet to address this issue directly. In *United*
 24 *States v. Ameline*, 2005 WL 350811 (9th Cir. Feb. 9, 2005), the Ninth Circuit concluded that
 25 *Booker*, and therefore *Blakely*, applies to criminal cases pending on direct appeal at the time the
 26 *Booker* decision was rendered. *Ameline*, 2005 WL 350811, at *1. And, in *Cook v. United States*,
 386 F.3d 949 (9th Cir. 2004), the Ninth Circuit concluded that *Blakely* does not apply retroactively
 to second or successive § 2255 motions. However, the Ninth Circuit has not yet spoken on the
 issue of whether *Blakely* or *Booker* apply retroactively to cases on initial collateral review.

01 (2002), which, like *Blakely* and *Booker* applied *Apprendi* principles, is not retroactive on collateral
 02 review. *Schrivo*, 124 S.Ct. at 2526-27.

03 In *Ring*, the Supreme Court had held, in reliance on *Apprendi*, that the Sixth Amendment
 04 gave a defendant the right to a jury determination of all aggravating factors which may lead to the
 05 imposition of the death penalty. *Ring*, 536 U.S. at 609. In *Schrivo*, the Supreme Court analyzed
 06 the rule set forth in *Ring* under *Teague v. Lane*, 489 U.S. 288 (1989), to determine if the rule
 07 applied retroactively to cases already final on direct review. The Supreme Court concluded that
 08 *Ring*'s holding was properly classified as procedural because it did not alter the range of conduct
 09 that Arizona law subjected to the death penalty. Instead, "*Ring* altered the range of permissible
 10 methods for determining whether a defendant's conduct is punishable by death, requiring that a
 11 jury rather than a judge find the essential facts bearing on punishment." *Schrivo*, 124 S.Ct. 2523.
 12 The Supreme Court went on to state that "[r]ules that allocate decisionmaking authority in this
 13 fashion are prototypical procedural rules." *Id.*

14 There is no meaningful distinction between the type of constitutional rule announced in
 15 *Ring* and the type of constitutional rule announced in *Blakely* and *Booker*. Accordingly, *Blakely*
 16 and *Booker* should be treated as procedural decisions for purposes of retroactivity analysis.

17 New constitutional rules of criminal procedure generally do not apply retroactively to cases
 18 on collateral review. However, retroactive effect is given to a small set of "watershed rules of
 19 criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."
 20 *Schrivo*, 124 S.Ct. at 2524 (quotation marks and citations omitted). In *Schrivo*, the Court
 21 acknowledged that "[t]he right to jury trial is fundamental to our system of criminal procedure,"
 22 but concluded that judicial factfinding does not seriously diminish the accuracy of criminal
 23 proceedings. *Id.* at 2526. Thus, the Court held that the constitutional rule announced in *Ring* did
 24 not constitute a "watershed rule of criminal procedure" to be applied retroactively to cases already
 25 final on direct review. *Id.*

26 Based upon the Supreme Court's reasoning in *Schrivo*, this Court concludes that the

01 constitutional rule announced in *Blakely*, and more recently in *Booker*, does not constitute a
02 “watershed rule of criminal procedure” and therefore does not apply retroactively on collateral
03 review. *See Schriro*, 124 S. Ct. at 2526-27. The Court notes that this conclusion is consistent
04 with the conclusions reached by the Seventh and Eleventh circuits on this issue. *See McReynolds*
05 *v. United States*, 2005 WL 237642, at *1 (7th Cir. Feb. 2, 2005); *Varela v. United States*, 2005
06 WL 367095, at *2-3 (11th Cir. Feb. 17, 2005).

07 As this Court concludes that *Booker* does not apply retroactively to § 2255 cases on initial
08 collateral review, petitioner’s § 2255 motion must be denied. A proposed order accompanies this
09 Report and Recommendation.

10 DATED this 4th day of March, 2005.

11 s/ Mary Alice Theiler
12 United States Magistrate Judge

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